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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

STEPHEN GONSALVES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether knowledge of pending charges arising in one federal judicial district satisfies the specific intent requirement of the "fleeing from justice" tolling provision, as provided by Title 18, United States Code, Section 3290, to the statute of limitations for a separate and distinct offense arising in another judicial district?

2. Whether the prosecution is required to show due diligence in obtaining an indictment to warrant application of the "fleeing from justice" exception to the statute of limitations?

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No. _____

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STEPHEN GONSALVES,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Stephen Gonsalves, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on

April 28, 1982. Petition for rehearing was denied by the Ninth Circuit on June 3, 1982.

OPINION BELOW

On April 28, 1982, the Court of Appeals for the Ninth Circuit rendered its Opinion reversing the dismissal of the indictment against Petitioner and remanding the case for further findings of fact. A copy of the Opinion is attached as Appendix A.

JURISDICTION

On April 28, 1982, the Court of Appeals entered judgment reversing the dismissal of the indictment against Petitioner and remanding the case for further findings of fact (Appendix A).

An Order denying a Petition for Rehearing was entered on June 3, 1982, a copy of which is attached as Appendix B. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1253 (1). 1/

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 3282, provides:

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

Title 18, United States Code, Section 3290, provides:

1/ No other petitioner is involved in this petition.

"No statute of limitations shall extend to any person fleeing from justice."

STATEMENT OF THE CASE

Procedural and Jurisdictional History

The offenses charged in the indictment are alleged to have terminated on August 5, 1975. The indictment was filed on September 30, 1980 (C.R. 2). Jurisdiction of the District Court for the Southern District of California was based upon Title 18, United States Code, Section 3231. The defendant's motion to dismiss the indictment was granted on February 20, 1981. Pursuant to the provisions of Title 18, United States Code, Section 3731, the government appealed the dismissal of the indictment. The appeal was granted by the Court of Appeals for the Ninth Circuit

on April 28, 1982, and the case was reversed and remanded for further findings of fact.

STATEMENT OF FACTS

This case began on August 6, 1975, when co-conspirators Hillman and Geiger were arrested in Beirut, Lebanon, in possession of computers containing contraband narcotics. This contraband gave rise to a series of prosecutions in the federal courts of the United States, including the instant proceeding. A complaint was immediately issued on August 6, 1975, in the Southern District of California naming eight individuals as defendants (RT III, 41). 2/

2/ RT refers to the reporter's transcript of the motion hearings in this case. Each volume is separately (continued)

Stephen Gonsalves was not named in this complaint. Id.

Subsequent to the issuance of the complaint, an indictment was returned by the Grand Jury on August 12, 1975, naming the same eight defendants (RT III, p. 42). Again Stephen Gonsalves was not named. Id. On or about October 6, 1975, a superseding indictment was filed naming the original eight defendants and adding two additional co-defendants: Craig and Raylene Wright (RT III, pp. 42-43). Stephen Gonsalves was again not named (RT III, p. 44).

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paginated. For convenience, the following designations are used:

Volume Date	Reference
October 6, 1980	RT I
December 8, 1980	RT II
January 19, 1981	RT III
January 26, 1981	RT IV
January 3, 1981	RT V
February 10, 1981	RT VI
February 11 & 17, 1981	RT VII

As early as the fall of 1975, Drug Enforcement Administration Investigator Cooper, the government agent responsible for the prosecution of this case, was afforded documents from the Lebanese authorities, disclosing statements taken from Geiger and Hillman (RT III, pp. 44, 45). These statements revealed that Gonsalves was involved in the scheme. Id. In fact, at this time, Cooper himself identified Gonsalves as the financier of the operation (RT III, pp. 45-46). Cooper's investigation did not end there. In February, 1976, he went to Beirut and interviewed Geiger and Hillman, who both identified Gonsalves as involved in the operation (RT III, p. 50). In March, 1976, after their trial, Shinafelt and Dunn, co-conspirators named in the original complaint and

indictment, were both interviewed by Cooper, and each gave information about and confirmed that Gonsalves was involved (RT III, pp. 56-57; RT IV, pp. 75, 77; RT V, pp. 6, 8, 11-12, 31-33). Hillman was similarly debriefed upon his return to the U.S. in 1977-78 and further implicated Gonsalves (RT III, p. 61). A complaint was issued on December 3, 1976, naming Gonsalves (RT III, p. 83), but no efforts whatsoever were undertaken to secure an indictment against him (RT III, p. 63). Immunity was never sought to obtain the testimony of the above witnesses before the grand jury (RT III, p. 59). Nor were any of these witnesses ever subpoenaed before the grand jury, although they were available and accessible to the government (RT III, pp. 13, 31, 34, 68, 63; RT IV, p. 60).

Sometime in mid-1980, Gonsalves contacted an attorney, who advised him that no charges were pending in the Southern District of California (RT II, pp. 15-16), but did notify him that he believed Gonsalves was subject to an outstanding federal warrant in Las Vegas (RT II, pp. 9-10). [3] Shortly

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[3] The evidence as to the date of this conversation was ambiguous at best. The government requested that the court make a finding "that defendant was aware of the fact that he was wanted in the District of Las Vegas from at least March, 1980" (RT VIII, p. 10). The court stated "I have problems with even finding that . . .," id., and after hearing further argument stated, "The best I can give you is June . . .." After objection by the Assistant U.S. Attorney, the court finally held, "Well, I just have to leave it like that. I can't make a finding. No one ever pinned it down." (RT VIII, p. 20.) The Court of Appeals has remanded the instant case to the District Court for specific findings on the issues of whether Gonsalves was a fugitive on the Las Vegas charge, and if so, for what period of time (Appendix A, p. 6).

thereafter, Gonsalves contacted another attorney and made arrangements to surrender in the Las Vegas matter (RT III, pp. 111, 103-106, 126; RT II, pp. 16-17).

It was not until September 30, 1980, almost two months after the five-year statute of limitations had expired, that an indictment was filed against Gonsalves (C.R. 2).

In the proceedings below the government contended that the operation of the statute of limitations was suspended by the terms of Title 18, United States Code, Section 3290, because Gonsalves was "fleeing from justice." The district court found, and the Court of Appeals for the Ninth Circuit affirmed, that Gonsalves was not aware that he was wanted or that charges were pending in

the United States District Court for the Southern District of California.

The Court of Appeals held that the district court must make findings on whether Gonsalves was "fleeing from justice" on the Las Vegas charges because Gonsalves' flight on these charges is relevant to whether the statute of limitations on the San Diego indictment was tolled under Section 3290 (Appendix A, p. 4). The Court further held that the government is not required to show due diligence in obtaining the indictment to take advantage of the tolling provision of Section 3290. Id. at p. 10, n. 5.

REASONS FOR GRANTING THE WRIT

I. RESOLUTION OF THE EXTENT AND NATURE OF PROOF REQUIRED TO JUSTIFY APPLICATION OF THE "FLEEING FROM JUSTICE" EXCEPTION PROVIDED BY TITLE 18, UNITED STATES CODE, SECTION 3290, TO THE STATUTE OF LIMITATIONS IS AN IMPORTANT QUESTION REQUIRING DETERMINATION BY THIS COURT.

A. SPECIFIC INTENT

Since 1895, when this Court decided **Streep v. United States**, 160 U.S. 128 (1895), the Supreme Court has not taken the opportunity to review the complex and important issues raised by the "fleeing from justice" exception to the statute of limitations provisions related to criminal offenses. During the intervening eighty-seven years, the Courts of Appeals have had numerous opportunities to interpret both the requirements of the statutory tolling

provision, presently codified at Title 18, United States Code, Section 3290, and the Court's decision in **Streep v. United States, supra.** What has resulted is conflict in the Circuit Courts of Appeals on the issue of whether the statute requires specific intent, and confusion as to the nature and extent of proof required to be shown by the prosecution. This conflict and confusion is nowhere better illustrated than in the decision rendered by the Court of Appeals for the Ninth Circuit in the instant case. Petitioner strongly urges that this Honorable Court exercise its discretion and, at long last, clarify the important issues raised by this petition.

Title 18, United States Code, Section 3290 (hereinafter referred to as

"Section 3290"), provides that "no statute of limitations shall extend to any person fleeing from justice," and thus operates to toll the five year statute of limitations provided by Title 18, United States Code, Section 3282. The Ninth Circuit Court of Appeals, together with the Courts of Appeals for the First, Second,and Fifth Circuits, have held that in order to toll the statute of limitations by the provisions of Section 3290, a specific intent to flee must be proven. **United States v. Wazney**, 529 F.2d 1287 (9th Cir. 1976); **Jhirad v. Ferrandina**, 486 F.2d 442, on remand 401 F.Supp. 1215, aff'd., 536 F.2d 478 (2nd Cir. 1973); **Donnell v. United States**, 229 F.2d 560 (5th Cir. 1956); **Brouse v. United States**, 68 F.2d 294 (1st Cir. 1933). On the other hand,

the District of Columbia Circuit, and the Fourth and Eighth Circuit Courts of Appeals have interpreted Section 3290 as not requiring a showing of specific intent. **Green v. United States**, 188 F.2d 48 (D.C. Cir.), cert. denied, 341 U.S. 955, reh. denied, 342 U.S. 842 (1951); **King v. United States**, 144 F.2d 729 (8th Cir.), cert. denied, 324 U.S. 854; **McGowen v. United States**, 105 F.2d 791 (D.C. Cir.), cert. denied, 308 U.S. 552 (1939); **Re Bruce**, 132 F. 390, aff'd., 136 F. 1022 (4th Cir. 1904); **Howgate v. United States**, 7 App. D.C. 217 (1895). These conflicting decisions have each relied in part upon this Court's decision in **Streep v. United States**, supra.

In **Streep v. United States**, supra, the defendant breached his bond and fled

the jurisdiction on state charges arising from the same offense for which the defendant was later indicted in the federal courts. The question faced by the court was whether fleeing on the state charge would operate to toll the statute of limitations on the federal charge. This Court held that "any person who takes himself out of the jurisdiction with the intention of avoiding being brought to justice for a particular offense can have no benefit of the limitation, at least when prosecuted for the offense in a court of the United States." Streep v. United States, supra at 133 (emphasis added). The Court further held in language that has since been subject to much discussion and debate, that:

> "A person fleeing from justice need not have in mind the

> object of avoiding the process of a particular court, or the question whether he is amenable to the justice of the nation or of the state or both. Proof of a specific intent to avoid either could seldom be had, and to make it an essential requisite would often defeat the whole object of the provision in question."
> Id. at 134.

The Court concluded by holding that:

> "[I]t is not necessary that there should be an intent to avoid the justice of the United States, but it is sufficient that there is an intent to avoid the justice of the state having criminal jurisdiction over the same territory and the same act."
> Id. at 135.

Contrary to the cited language, the Ninth Circuit Court of Appeals in the instant case has held that the fact that a defendant is fleeing from justice on offenses unrelated to the charged offense, in a different territory, is relevant on the issue of whether he is

fleeing from justice on the charged offense.

There is only one other circuit court opinion dealing with this issue. In **King v. United States, supra**, the Eighth Circuit, one of three circuits which do not require specific intent, held that fleeing on charges from one federal jurisdiction warranted a finding that the defendant was a fugitive from a second jurisdiction. Absent the decision in the case at bar, no court has addressed the dual issue of whether specific intent is required, and, if so, whether fleeing from charges in one jurisdiction will satisfy the specific intent requirement as to charges in a second jurisdiction. It is this question that the Court is requested to address. For it is Petitioner's

contention that if this decision is permitted to stand, the entire specific intent requirement as elucidated by this Court in Streep v. United States, supra, will be abrogated.

Petitioner's position is consistent not only with the Court's holding in Streep, but with the reasons behind the enactment of the statute of limitations and the tolling provision of Section 3290. Statutes of limitations give effect to the policy judgment that an accused should not be forced to stand trial a long period of time after the alleged commission of a crime because crucial witnesses may disappear and testimony will be less reliable. See Toussie v. United States, 397 U.S. 112 (1970). A time limit also has the effect of encouraging law enforcement

officials' prompt investigation of suspected criminal activity. Id.; Note, 102 U. of Pa. L.R. 632, 632-633 (1954). The tolling provision further reflects the judgment of Congress that the benefit of the statute of limitations should not be given to an accused who by his own conduct delays prosecution. **Toussie v. United States, supra;** Recent Cases, 104 U. of Pa. L.R. 1111, 1113 (1956).

Thus, where the defendant engages in conduct to assure he will not be prosecuted, he will not be permitted to benefit from the statute. But on the other hand, "it would do violence to the intent and purpose of Section 3290 to hold that a person was 'fleeing from justice' so as to suspend the running of the statute of limitations if he legitimately left the district of the supposed

crime or moved his home openly to another district, being on the whole easily accessible to any officer who might have a warrant to serve." **Donnell v. United States**, 229 F.2d 560, 564 (5th Cir. 1956); accord, **Jhirad v. Ferrandina**, **supra**. It is, therefore, the defendant's intent to avoid prosecution and to benefit from the statute of limitations with respect to a particular offense which is critical. Particularly because the statute of limitations is to be liberally construed in favor of the accused, **Toussie v. United States**, **supra**, this Court should take this opportunity to reaffirm and clarify the specific intent requirements of the Section 3290 tolling provisions.

B. DILIGENCE

The Ninth Circuit Court of Appeals, in its opinion in this case, held that the government is not required to show due diligence in obtaining the indictment to take advantage of the tolling provision of Title 18, United States Code, Section 3290 (Appendix A, p. 10, n. 5).

The interests protected by the statute of limitations are a hybrid of the considerations underlying double jeopardy and speedy trial rights. Fairness to the defendant would appear to be the primary consideration of such provisions. **United States v. Levine**, 658 F.2d 113 (3rd Cir. 1981). The "fleeing from justice" tolling provision counterbalances the limitation statutes by assuring that a defendant may not take advantage of such limitations by delay

of his own making. Recent Cases, 104 U. of Pa. L.R. 1111, 1113 (1956). Thus, inherent in the relationship between the two statutes is the issue of culpability: is the delay caused by the government or by the accused? It is Petitioner's contention that where the government has failed to show diligence in obtaining the indictment, the culpability cannot be assigned to the defendant. It is his further contention that once the defendant raises a prima facie showing of lack of diligence, it is the prosecution's burden to show its diligence in obtaining the indictment, and, if contended, it is also the government's burden to prove that the defendant was "fleeing from justice." See United States v. Hankin, 607 F.2d 611 (3rd Cir. 1979); United States v.

Wazney, supra; Brouse v. United States, 68 F.2d 294 (1st Cir. 1933), holding that the burden of proof is upon the government to show that the prosecution was instituted within the applicable statute of limitations.

Petitioner's view is supported by the holding in **United States v. Eliopoulous,** 45 F.Supp. 777 (D.C. N.J. 1942), where the court held that despite defendant's absence, the government should have filed a timely indictment. Further support is found in the recent Ninth Circuit opinion in **Caplan v. Vokes,** 649 F.2d 1336 (9th Cir. 1981), [4/] an

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[4/] A Petition for Rehearing based upon the conflict between the decision in **Caplan v. Vokes, supra,** and the decision in the instant case was denied on June 3, 1982.

extradition case, where the Court stated:

> "Certainly Caplan did not cause any delay by unacceptable conduct . . .
>
> "His departure may have necessitated extradition procedures, but it did not cause the British government's lengthy delay in initiating prosecution. The government had obtained whatever information it needed from Caplan before his departure. As Caplan notes, adoption of the government's argument would mean that for the duration of the applicable statute of limitations there was no burden of diligence on the government and that Caplan simply could not leave England in any manner or under any circumstances."
>
> Id. at 1341.

Absent a showing of diligence by the government, the burden upon the defendant becomes intolerable in light of the democratic rights guaranteed by the Constitution of the United States. The potential, although unaware, defendant

in effect carries the burden of reporting his whereabouts to the government in violation of his right to privacy. See **Griswold v. State of Connecticut**, 381 U.S. 479 (1965). Furthermore, his personal mobility is restricted. **Memorial Hospital v. Maricopa County**, 415 U.S. 250 (1974); **Shapiro v. Thompson**, 394 U.S. 618 (1969).

This Court is urgently requested to address and resolve this delicate balance of protections to both the government and the defendant as assured by the statutes of limitations and the tolling provision of Section 3290.

C. SIGNIFICANCE OF THE ISSUES PRESENTED BY THE PETITION

This Petition raises important issues involving both the statutes of limitations and related tolling provisions which have not been addressed by this Honorable Court in almost a century. Statutes of limitations, while not constitutionally provided, protect interests guaranteed by the double jeopardy and speedy trial provisions of our Constitution. While not inviolable, "these statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." United States v. Marion, 404 U.S. 307, 322 (1971). Statutes of limitations represent a legislative assessment of the relative

interests of the State and the defendant in administering and receiving justice. United States v. Marion, supra at 322. At a minimum, because such statutes are the primary guarantee against bringing overly stale criminal charges, see United States v. Ewell, 383 U.S. 116 (1966), they are, in criminal cases, liberally interpreted in favor of repose. See United States v. Habig, 390 U.S. 222 (1968).

Given these considerations, the questions related to diligence and specific intent raised by this Petition are important ones that should be addressed by this Court.

CONCLUSION

For the foregoing reasons, Petitioner Stephen Gonsalves respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in order to resolve the questions presented herein as to the extent and nature of proof required to justify application of the "fleeing from justice" exception provided by Title 18, United States Code, Section 3290, to the statute of limitations.

Dated: June 18, 1982.

Respectfully submitted,

FRANK & MILCHEN

BY: HOWARD B. FRANK

Attorneys for Petitioner

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

STEPHEN GONSALVES,

Defendant-Appellee.

No. 81-1214
D.C. CR 80-00670-01
FILED: April 28, 1982
Phillip B. Winberry
Clerk, Court of Appeals

OPINION

Appeal from the United States
District Court for the Southern
District of California
Earl B. Gilliam, United States
District Judge, Presiding
Argued and Submitted
September 11, 1981

Before: KASHIWA, * Court of Claims Judge; FLETCHER and NORRIS, Circuit Judges

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* The Honorable Shiro Kashiwa, Associate Judge of the United States Court of Claims, sitting by designation.

NORRIS, Circuit Judge:

The government appeals from the district court's order dismissing a San Diego indictment against Gonsalves on the ground that it was barred by the five-year statute of limitations. 1/ The charges arose out of a a scheme to import hashish from Lebanon which was aborted at the Beirut airport on August 5, 1975, five years and 56 days before the date of the indictment. 2/

1/ 18 U.S.C. § 3282 provides: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offenses, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

2/ The indictment charged Gonsalves with violating 21 U.S.C. §§ 841(a)(1), 846, 952, 960, 963 (distributing, importing, and conspiracy to distribute and import controlled substances) and 21 U.S.C. § 843(b)(mail fraud). The essence of the indictment is that (continued)

The government contends that the indictment was not barred because the statute of limitations was tolled for a period longer than 56 days during which Gonsalves was "fleeing from justice" under 18 U.S.C. § 3290.

I.

18 U.S.C. § 3290 provides: "No statute of limitations shall extend to any person fleeing from justice." To take advantage of the tolling effect of § 3290, the prosecution must "prove that

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Gonsalves masterminded a scheme to import one ton of hashish from Lebanon in fake computer shells. After the plan was aborted in 1975, several men were indicted in San Diego and the next year were tried for their involvement in the Lebanese scheme. Gonsalves was not named in the original indictments; evidence of his involvement became known only after federal officers had interrogated several of the men charged with the crime. A warrant for his arrest--but no indictment--was issued in San Diego on December 3, 1976.

the accused concealed himself with the intent to avoid arrest or prosecution." United States v. Ballesteros-Cordova, 586 F.2d 1321, 1323 (9th Cir. 1978). "[T]o meet this burden, the prosecution need only prove that the defendant knew that he was wanted by the police and that he failed to submit to arrest." Id. The district court found that the government had failed to prove Gonsalves knew about the San Diego charges before the limitations period expired. We do not disturb that finding because our review of the record convinces us it was not clearly erroneous. See id. at 1324. We therefore affirm the district court's holding that Gonsalves was not fleeing from the San Diego prosecution.

The government argues further, however, that the statute of limitations

was tolled on the San Diego indictment because Gonsalves was fleeing from an unrelated federal indictment in Las Vegas. 3/ The district court rejected this argument, holding as a matter of law that fleeing from justice in one federal jurisdiction does not toll the statute of limitations on unrelated charges in a different jurisdiction. Accordingly, the district court made no findings of fact on the issue whether Gonsalves was fleeing from justice on the Las Vegas charges. We conclude that the district court must make findings on that issue because Gonsalves' alleged

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3/ In 1975, a Las Vegas grand jury had indicted Gonsalves for narcotics offenses unrelated to the Lebanese scheme. That indictment was subsequently dismissed but, in March 1976, Gonsalves was re-indicted in Las Vegas on similar charges.

flight from prosecution in Las Vegas is relevant to the issue whether the statute of limitations on the San Diego indictment was tolled under § 3290.

We are unable to reconcile the district court's restrictive reading of § 3290 with the statute's unqualified language that "no" statute of limitations shall extend to "any" person fleeing from justice. [4/] Moreover, we believe the congressional policies underlying the criminal limitations statute and the "fleeing from justice" exception to it are harmonized by interpreting § 3290 to deny the benefits of all statutes of limitation to a person

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[4/] Such unambiguous language in a criminal statute "should be accorded its plain meaning." United States v. Dangdee, 616 F.2d 1118, 1119 (9th Cir. 1980).

fleeing from justice in any federal jurisdiction.

"The purpose of the statute of limitations is to balance the government's need for sufficient time to discover and investigate the crime against the defendant's right to avoid perpetual jeopardy for offenses committed in the distant past." **United States v. Di Santillo**, 615 F.2d 128, 135 (3d Cir. 1980); see **Toussie v. United States**, 397 U.S. 112, 114-15 (1970). Congress has determined that when the accused in a criminal prosecution is purposely delaying prosecution by "fleeing from justice," the balance tips in favor of the government's need to investigate the crime, and the accused should be denied the benefits of the statute of limitations. See 104 U. Pa. L. Rev. 1111, 1113

(1956). When an accused knowingly secretes himself, even diligent investigators may be thwarted from uncovering facts essential to the prosecution. 5/ For the purposes of the "fleeing from justice" issue, hiding out from one set of federal law enforcement authorities is equivalent to hiding out from all of them; the investigation is hampered either way. Thus the period during which a person is subject to jeopardy under federal criminal laws is lengthened by the period during which he impedes

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5/ Golsalves asserts that the government should not be permitted to take advantage of the "fleeing from justice" exception to the statute of limitations when the prosecution has failed to show due diligence in filing an indictment. The government is not required to file an indictment or even to issue an arrest warrant when the accused is fleeing from justice. See United States v. Ballesteros-Cordova, 586 F.2d at 1323.

any federal criminal investigation by concealing himself with the intent to avoid arrest or prosecution. See United States v. Wazney, 529 F.2d 1287, 1289 n.1 (9th Cir. 1976).

In sum, we believe § 3290 reflects a congressional intent to deny a person fleeing from justice in any federal jurisdiction the protection of the criminal limitations statute on all federal offenses. 6/ Accord, King v. United

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6/ The government contends that Wazney is authority for the broad proposition that a person is fleeing from justice within the meaning of § 3290 if he conceals himself with the intent to avoid arrest or prosecution on unrelated state, as well as federal charges. In that case, the defendant was wanted for two crimes, forgery and an unrelated state charge. The federal warrant on the forgery charges was issued in September 1973. A state warrant had apparently already been issued in February 1971, when state officials requested the FBI to seek an arrest warrant for Wazney's interstate flight to avoid (continued)

States, 144 F.2d 729, 731 (8th Cir. 1944) (whether defendant was trying to escape from justice in federal court in Texas or in federal court in Arkansas, prosecution on the state charges.

Wazney surrendered to state authorities following a series of negotiations his attorney conducted with the state authorities on Wazney's behalf. The district court determined that Wazney was fleeing from justice on the forgery charges within the meaning of § 3290, and we affirmed. There is room, we concede, for doubt whether we held in Wazney that the federal limitations statute is tolled if a person flees from justice on state charges. Our opinion is arguably unclear whether Wazney was aware, prior to the time he surrendered to state authorities, that he was wanted on federal as well as state charges. In any case, we need not decide the broad proposition advanced by the government because the question whether concealing one's self with the intent to avoid state arrest or prosecution on unrelated charges constitutes fleeing from justice under § 3290 is not presented by the facts of Gonsalves' case. Cf. Streep v. United States, 160 U.S. 128, 135 (1895) (fleeing from justice on a state offense tolls the statute of limitations on the same offense under federal law.)

or both is immaterial), cert. denied, 334 U.S. 854 (1945); Brouse v. United States, 68 F.2d 294, 296 (1st Cir. 1933) ("The fleeing which tolls the statute is flight from the justice of the United States, not the justice of any particular jurisdiction."). We therefore hold that the district court erred in concluding as a matter of law that Gonsalves' alleged flight from justice on the Las Vegas charges was irrelevant to the tolling of the limitations statute on the San Diego charges.

II.

Gonsalves contends that even if fleeing from the Las Vegas charges tolls the limitations statute on the San Diego charges, the government failed to adduce evidence sufficient to support a finding that he concealed himself with the

requisite intent to avoid arrest on the Las Vegas charges. 7/ See Ballesteros, 586 F.2d at 1323; Wazney, 529 F.2d at 1289. He thus asks this court to hold as a matter of law that he was not fleeing from justice on the Las Vegas charges, thereby rendering unnecessary a remand to the district court for findings of fact on the issue.

7/ Although there was evidence that Gonsalves knew about the Las Vegas indictment in the spring of 1980, the trial judge made no finding that Gonsalves was intentionally fleeing from the Las Vegas charges for more than 56 days. The judge at one stage made a finding that Gonsalves was told about the Las Vegas indictment "sometime before June." Reporter's Transcript, vol. VII, at 17. After further argument, he amended his finding, stating "[t]he best I can give you is June." Id. at 20. Pressed by the government attorney to set the date at sometime in March 1980, the judge finally stated: "Well, I'll just have to leave it like that. I can't make a finding. No one ever pinned it down." Id. (emphasis added).

A.

In support of this contention, Gonsalves first argues that because the statute of limitations is an affirmative defense, the government must prove every element under § 3290 beyond a reasonable doubt. The government responds that preponderance of the evidence is the applicable standard of proof because the statute of limitations issue does not bear on the question of guilt or innocence. The question appears to be one of first impression.

The starting point of our inquiry is the fundamental principle that the reasonable doubt standard applies to the prosecution's proof for all "essential elements of the crime." **Jackson v. Virginia**, 443 U.S. 307, 319 (1979). This requirement "operates to give

'concrete substance' to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." Id. at 315 (quoting **In re Winship**, 397 U.S. 358, 363 (1970)). Similarly, after a criminal defendant shifts the burden to the prosecution by raising an affirmative defense relevant to the issue of guilt, the government must disprove every element of the affirmative defense beyond a reasonable doubt. See, e.g., **United States v. Hearst**, 563 F.2d 1331, 1336 & n.2 (9th Cir. 1977) (duress), cert. denied, 435 U.S. 1000 (1978); **United States v. Hermosillo-Nanez**, 545 F.2d 1230, 1232 (9th Cir. 1976) (entrapment), cert. denied, 429 U.S. 1050 (1977).

A major reason for adhering to the "reasonable doubt" standard is absent, however, when the evidence offered to prove a defense is unrelated to the issue of guilt. Faced with an argument that the prosecution must prove beyond a reasonable doubt that a defendant's confession was voluntary, the Supreme Court in Lego v. Twomey, 404 U.S. 477, 486-89 (1972), held that the prosecution need only prove voluntariness by a preponderance of the evidence. Although acknowledging that "[a] high standard of proof is necessary . . . to ensure against unjust convictions by giving substance to the presumption of innocence," the Court in Lego reasoned that "[a] guilty verdict is not rendered less reliable . . . simply because the admissibility of a confession is determined

by a less stringent standard." Id. at 486-87.

Similarly, an eventual guilty verdict is not rendered less reliable simply because the issue of fleeing from justice is determined by a less stringent standard. A defendant would still be protected from an unreliable jury verdict by the presumption of his innocence and the adversary system. The prosecution, in trying to prove the defendant's guilt beyond a reasonable doubt, would doubtless face defense arguments that the incriminating evidence had lost its probative value because of the passage of time. Additionally, the trial court has the discretion to exclude stale evidence. See, e.g., International Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F.2d 449, 460 (1st Cir.) (statute of

limitations does not govern admissibility of evidence, but trial court may place reasonable limits upon evidence or set reasonable cut-off date before which evidence is considered too remote to have probative value), cert. denied, 375 U.S. 820 (1963). Because we find these safeguards adequate to protect the reliability of a jury verdict, we hold that preponderance of the evidence is the standard of proof applicable to the issue of fleeing from justice under § 3290.

We further hold that the government adduced sufficient evidence at the four-day hearing to support a finding, had the district court made one under the preponderance of the evidence standard, that Gonsalves was fleeing from justice on the Las Vegas charges for a period

long enough to toll the limitations statute on the San Diego charges for more than 56 days. A remand is thus necessary to allow the district court to evaluate the evidence and to make appropriate findings on that issue.

B.

Gonsalves next argues that even if the evidence shows that he had been fleeing from justice on the Las Vegas charges, his flight ended on the day he asked his lawyer to surrender him to Las Vegas authorities. Gonsalves relies on what he claims to be undisputed evidence that he attempted to surrender through his lawyer after learning about the Las Vegas indictment. He argues that his delay in actually surrendering was dictated by his lawyer's intervening vacation and trial obligations, and not by

Gonsalves' attempt to avoid prosecution. In support of that contention, Gonsalves points to his lawyer's testimony that Gonsalves claimed he wanted to turn himself in to "clean up his life," get married, and be with his family. We find that this contention implicitly raises the question whether the statute of limitations is tolled under § 3290 during the time a person with knowledge he is wanted on criminal charges is making a good faith effort to surrender.

The government asserts that because it presented sufficient evidence to demonstrate that Gonsalves knew he was wanted in Las Vegas, **Wazney** controls the outcome in this case. [8/] Gonsalves responds by relying on the portion of

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[8/] For a discussion of the facts and holding of **Wazney** see note 6, **supra.**

the **Wazney** opinion where this court emphasized that, "by engaging in negotiations with state officials through his attorney, [Wazney] clearly made known his intent to remain hidden from the authorities until a satisfactory settlement of the state charges against him could be reached." 529 F.2d at 1289. In contrast, Gonsalves argues, he was not negotiating through his lawyer for a "satisfactory settlement" of the Las Vegas charges against him; he was merely trying to surrender.

We agree with Gonsalves that we did not decide that question in **Wazney**. We now hold that the limitations period is not tolled during the time an accused is making a good faith effort to surrender. A finding that the accused made a good faith effort to surrender strikes us as

inconsistent with a finding that he had the requisite specific intent to flee from justice. Mindful that "criminal limitations statutes are 'to be liberally interpreted in favor of repose,'" **United States v. Habig**, 390 U.S. 222, 227 (1968) (quoting **United States v. Scharton**, 285 U.S. 518, 522 (1932)), we conclude that an accused's good faith effort to surrender tips the balance on the issue of tolling the statute under § 3290 in favor of the accused's right to avoid perpetual jeopardy. See **United States v. Di Santillo**, 615 F.2d at 135.

On the present record, however, we cannot determine, as a matter of law, whether or when Gonsalves made a good faith effort to surrender to the Las Vegas authorities. Those are issues of

fact that must be determined in the first instance by the trial judge. 9/

REVERSED and REMANDED.

9/ At the end of four days of hearings, after the district court had dismissed the indictment, the government cited a case stating that a jury should decide the "fleeing from justice" issue. See Donnell v. United States, 229 F.2d 560, 563 (5th Cir. 1956). The district court refused to consider the jury issue, ruling in effect, that the government had waived its right to raise the issue. We agree that by waiting until after four days of hearings and the dismissal of the indictment, the government waived the right to raise this issue. Cf. Frazier v. United States, 335 U.S. 497, 513-14 (1948) (a defendant waives his right to object to bias of individual jurors when he fails to object before trial).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

STEPHEN GONSALVES,

Defendant-Appellee.

No. 81-1214
D.C. CR 80-00670-01
FILED: June 3, 1982
Phillip B. Winberry
Clerk,
U.S. Court of Appeals

ORDER

Before: KASHIWA *, Court of Claims Judge, FLETCHER and NORRIS, Circuit Judges.

Appellee's petition for rehearing is DENIED.

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* The Honorable Shiro Kashiwa, Associate Judge of the United States Court of Claims, sitting by designation.